BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
)
MARGARET P. WOERNER AND)
ESTATE OF MAX C. WOERNER, DECEASED)

Appearances:

For Appellant: V. G. Skinner, Attorney at Law

For Respondent: A. Ben Jacobson, Associate Tax Counsel

O P I N I O N

These appeals are made pursuant to Section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on protests to proposed assessments of additional personal income tax against Margaret P. Woerner in the amount of $1,670.84 for the year 1951, against the Estate of Max C. Woerner, deceased, in the amount of $1,670.84 for the year 1951, and jointly against Margaret P. Woerner and the Estate of Max C. Woerner, deceased, in the amount of $4,856.56 for the year 1952.

Max C. Woerner operated two retail cigar and liquor stores in San Francisco. At both stores dice games, pinball machines and claw machines were in operation and were played by customers of the stores.

Max C. Woerner and his wife, Appellant Margaret P. Woerner, filed separate income tax returns for 1951, each reporting half of the community income including the income from the stores. For 1952, they filed a joint return. Max C. Woerner died in 1953 and Margaret P. Woerner was appointed administratrix of the estate with the will annexed. Administration of the estate was completed in 1954 and the assets were distributed and the administratrix was discharged.

On the ground that illegal gambling was conducted, Respondent disallowed all the expenses of the two stores pursuant to Section 17359 (now 17297) of the Revenue and Taxation Code, and on April 5, 1956, issued notices of proposed assessment. The proposed assessments for 1951 were computed by allocating half of the disallowed expenses to Margaret P. Woerner and the other half to the hstate of Max C. Woerner.

It is first contended that the assessment for 1951 against the Estate of Max P. Woerner is barred because it was not made within one year from the time of Mr. Woerner's death. For this proposition, Appellants rely upon Dep't of Mental Hygiene v. Rosse, 187 Cal. App. 2d 283. That case indicated that Section 353 of the Code of Civil Procedure controls as to the time within which a court action may be brought against the representative of a deceased person. Since the assessment in question did not constitute the commencement of a court action, the case and the statute have no application *here.* (Code Civ. Proc. §§ 312, 20-24; Bold v. Board of Medical Examiners, 133 Cal. App. 23.)

It is unquestioned that the notice of proposed assessment was issued within the time permitted by Section 18586 of the Revenue and Taxation Code, that is, four years from the time the return was filed. The fact that the proposed assessment was issued after the estate was distributed and the administratrix was discharged does not compel a conclusion that the proposed assessment was void, at least in the absence of a showing that Respondent was properly notified of the discharge . (Rev. & Tax. Code § 19261; Sanborn v. Helvering, 108 F 2d 311; Tooley v. Commissioner, 121 F.2d 350.)

Respondent argues that, pursuant to Section 19265 of the Revenue and Taxation Code, Margaret Woerner is personally subject to any tax liability resulting from the 1951 assessment against the Estate of Max Woerner. Section 19265 provides that any fiduciary who pays any claim against an estate or who distributes the assets of an estate before he pays the personal income tax imposed on the estate is personally liable for the tax.

In so far as relevant to the problem at hand, Section 19265 is identical to Section 3467 of the Revised Statutes of the United States (31 U.S.C. § 192). It has been established by the Tax Court that the question of the personal liability of a fiduciary may not be considered in a proceeding based upon a notice of deficiency directed to the estate or to the fiduciary in his representative capacity and not in his personal capacity. (Estate of L. E. McKnight, 8 T.C. 871; Estate of Theodore Geddings Tarver, 26 T.C. 490, 498, aff'd 255 F.2d 913.) Upon that authority, the question of the personal liability of Margaret Woerner with respect to the assessment against the estate for the year 1951 is not properly before us.

A joint return was filed for 1952 and therefore Margaret P. Woerner is personally liable for the entire deficiency, if any, for 1952 (Rev. & Tax. Code § 18555).

Turning now to the merits, it is conceded that dice games were played at both cigar stores. Appellants+ version of the facts is that when a player won, a notation was made entitling the player to a given amount of merchandise and that the player, either when he stopped playing or at a later date, selected the merchandise he desired from the merchandise customarily sold at the store.

Section 330 of the Penal Code makes it illegal to conduct any banking game played with dice for "money, checks, credit, or other representative of value.++ It is agreed that the two cigar stores conducted banking games played with dice. The question for decision is whether even on Appellants+ view of the facts, the games were played for "money, checks, credit, or other representative of value.++

In Ex parte Williams, 7 Cal. Unrep. 301, 87 P. 565, the District Court of Appeal held that the operation of a slot machine which dispensed cigars to winners was not a violation of Section 330 in that the machine was not played for "money, checks, credit, or other representative of value."

The case of In re Lowrie, 43 Cal. App. 564, held that where a dice game is played for chips redeemable in merchandise, there is a violation of Section 330 in that the chips are representatives of value.

In our view the mechanics by which a winning player received merchandise necessarily involved playing the game for credit. As an example, assume that after playing for 30 minutes a player is ahead $2.00 worth and decides to leave. He selects one or more articles of merchandise with a retail price totaling $2.00. His selection from merchandise in the store amounts to the using up of a merchandise credit which he has won. It is similar to a gift certificate or credit memorandum, even though no credit memorandum or similar document is issued. We do not agree with Appellants+ contention that in "the absence of issuance of a credit memorandum of some sort++ there is no violation.

The application of laws generally is dependent on the substance of what happened rather than on the mechanics of execution. The substance of the dice games was playing for merchandise credit and it is immaterial whether a credit memorandum was issued to the player, the operator made a private notation or the parties just remembered the amount. Likewise it is immaterial whether the merchandise credit was used by the player immediately upon finishing play or at a future date.

The operation of the dice games was thus a violation of Section 330 of the Penal Code. We have previously held the operation of a claw machine to be a violation of Section 330a of the Penal Code whether or not a successful player is permitted to redeem the merchandise for cash. (Appeal of Perinati, Cal. St. Bd. of Equal., Apr. 6, 1961, 3 CCH Cal. Tax Cas. Par. 201-733, 3 P-H State and Local Tax Serv. Cal. Par. 58191; Appeal of Seeman, Cal. St. Bd. of Equal., July 19, 1961, 3 CCH Cal. Tax Cas. Par. 201-825, 3 P-H State and Local Tax. Serv. Cal. Par. 58208.) Accordingly, Respondent was correct in applying Section 17359.

The dice games alone accounted for over half of the gross profit of the two stores and it is obvious that merchandising was largely a front for gaming. Therefore, the merchandising was associated or connected with the illegal activities and it was proper to disallow the *expenses* of the entire business,

O R D E R

Pursuant to the views expressed in the Opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on protests to proposed assessments of additional personal income tax against Margaret P. Woerner in the amount of $1,670.84 for the year 1951, against the Estate of Max C. Woerner, deceased, in the amount of $1,670.84 for the year 1951, and jointly against Margaret P. Woerner and Max C. Woerner, deceased, in the amount of $4,856.56 for the year 1952, be and the same is hereby sustained.

Done at Sacramento, California, this 25th day of April, 1962, by the State Board of Equalization.

Geo. R. Reilly, Chairman
John W. Lynch, Member
Alan Cranston, Member
Paul R. Leake, Member
Richard Nevins, Member

ATTEST: Dixwell L. Pierce, Secretary